

**Joint Legislative Audit and Review Commission  
of the Virginia General Assembly**



**Review of the Virginia  
Birth-Related Neurological  
Injury Compensation Program**

**Staff Briefing  
November 12, 2002**

# Introduction

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## Staff for this study:

**Glen Tittermary, Division Chief**

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# Presentation Outline

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- ☒ Introduction
- ☐ Impact of the Birth Injury Program
- ☐ Status of the Birth Injury Program
- ☐ Eligibility for the Birth Injury Program
- ☐ Program Administration

# Study Mandate

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- At its January 2002 meeting, JLARC directed staff to conduct a review of the Virginia Birth-Related Neurological Injury Compensation Program
- In addition, staff were requested to examine the provisions of House Bill 714 (2002) as part of this study

# The Birth Injury Program

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- The birth injury program pays for the medical and certain other expenses of children who have severe neurological injuries resulting from the birthing process
- It is intended as an alternative to the traditional tort system for obtaining compensation for injuries

# Study Issues

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- To what extent are births in Virginia covered by the program?
- What is the impact of the program on birth-injured children?
- What is the impact of the program on physicians, hospitals, and the insurance industry?
- Is the program's eligibility process sound?
- Is the program effectively structured and operated?
- Is the birth injury fund financially sound?

# Research Activities

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## ■ Structured Interviews

## ■ Surveys:

- Claimant families
- Participating physicians
- Non-participating physicians who provide obstetric services
- Participating hospitals
- Non-participating hospitals with obstetric care units

## ■ Review of WCC opinions and case files

## ■ Review of Board of Medicine physician reviews

# Research Activities

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- Review of program financial records
- Review of actuarial studies
- Analysis of Virginia Health Information (VHI) data
- Analysis of the National Practitioner Data Bank (NPDB) public use file
- Document reviews



# Summary of Findings

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- JLARC staff found that the birth injury program's impact is generally favorable for birth injured children, physicians, hospitals, and malpractice insurers
- However, it is less clear that the program has achieved the societal benefits intended
- The birth injury fund is actuarially unsound, however there is no threat of a short-term deficit
- If the program is maintained, changes are needed to the process for eligibility determination, as well as to the structure and operation of the program

# History of the Birth Injury Program

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- Increasing medical malpractice lawsuits and insurance premiums in the 1980s led to a crisis in obstetrics, in which Virginia physicians were reportedly eliminating obstetrical care from their practices
- Rural areas of Virginia, as well as indigent women, were reported to be particularly affected by this situation
- To ameliorate this problem, several tort law changes were enacted, including the Virginia Birth-Related Neurological Injury Compensation Act. The birth injury program became operational on January 1, 1988

# Purpose of the Program

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- **The ultimate goal of the birth injury act was to ensure the availability of affordable medical malpractice insurance for obstetric service providers, and thus keep obstetric providers in Virginia**
- **The program was intended to serve three main purposes:**
  - **Remove medical malpractice lawsuits resulting from severe birth injuries from the tort system**
  - **Provide for an alternative way of compensating for severe birth injuries**
  - **Ensure the availability of obstetric care for indigent women**

# Purpose of the Program

(continued)

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- Infants severely injured at birth were singled out for this approach because lawsuits of this type have a high rate of success and tend to result in large awards
- The program was designed as a no-fault system of compensation. Therefore, the claimant does not have to prove that the doctor's action or inaction caused the birth injury
- The birth injury program is an exclusive remedy – infants and mothers are barred from bringing suit in the tort system if the infant is eligible for the program

# Program Eligibility

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- An infant is eligible for inclusion in the program if his or her injury meets the definition contained in §38.2-5001 of the *Code of Virginia*:

***“Birth-related neurological injury”*** means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled...such disability shall cause the infant to be permanently in need of assistance in all activities of daily living

- The infant also must have been delivered by a participating physician or at a participating hospital

# Administration of the Program

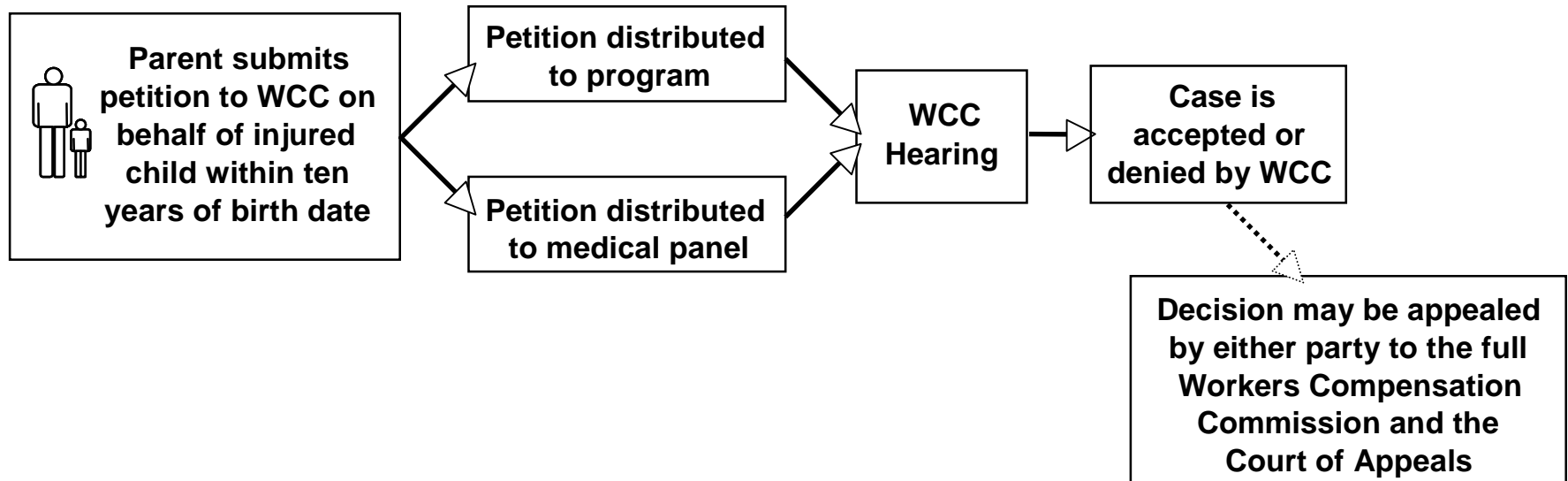
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- **The Workers' Compensation Commission (WCC) determines each child's eligibility for the program**
- **The State Corporation Commission (SCC) has some financial responsibilities vis-à-vis the fund**
- **The birth injury program is governed by a board of directors charged with directing the investment of the fund, deciding benefit requests from claimants, and overseeing the program director**

# Eligibility Process

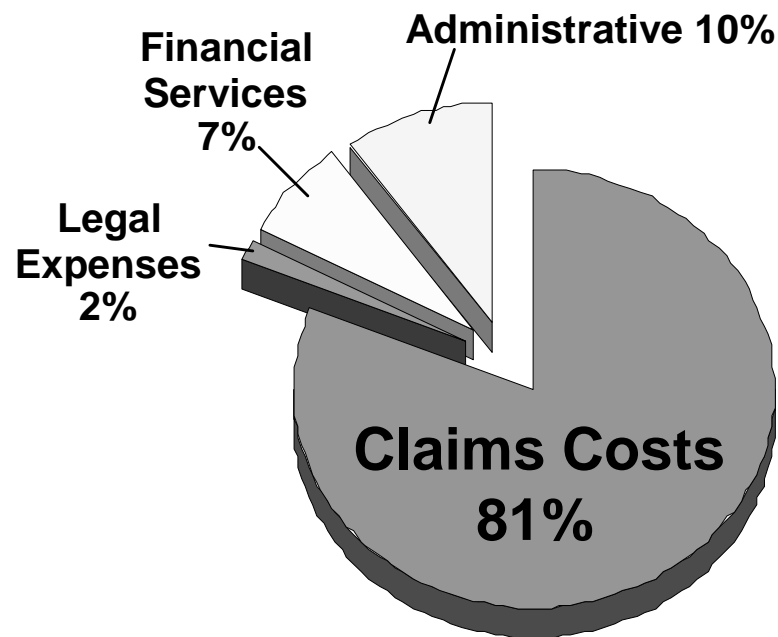
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# Program Expenditures, by Type

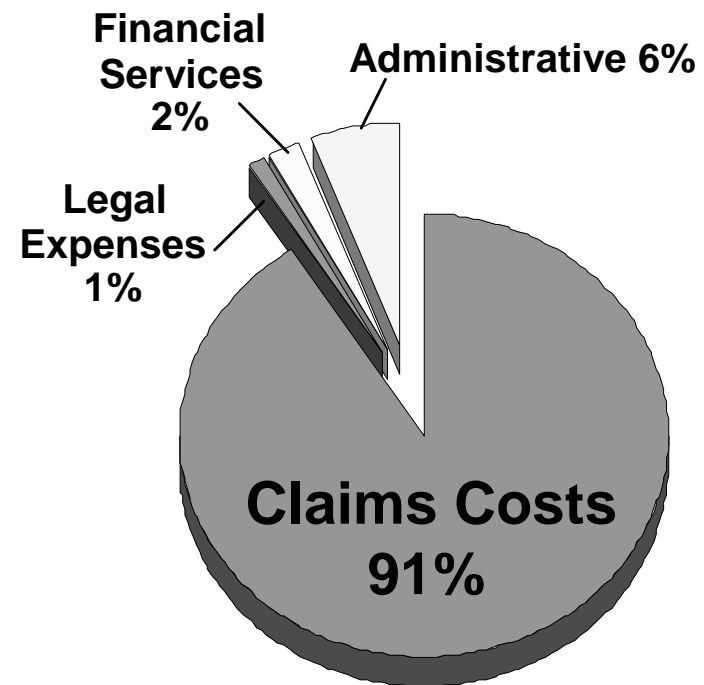
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**Total Expenses 1988-2001**



**Total Expenses:  
\$28,573,248**

**2001 Expenses Only**



**Total Expenses:  
\$6,450,298**



# Program Claimants

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- **As of October 2002, 75 children have been accepted into the birth injury program. The children range in age from one to 14 years**
- **By definition, each of the claimants has severe physical and cognitive disabilities that render them incapable of independently performing the basic activities of daily living**
- **The largest proportion of children in the program are from Northern Virginia (33%), the Richmond metropolitan area (14%), and Tidewater (14%)**

# Program Benefits

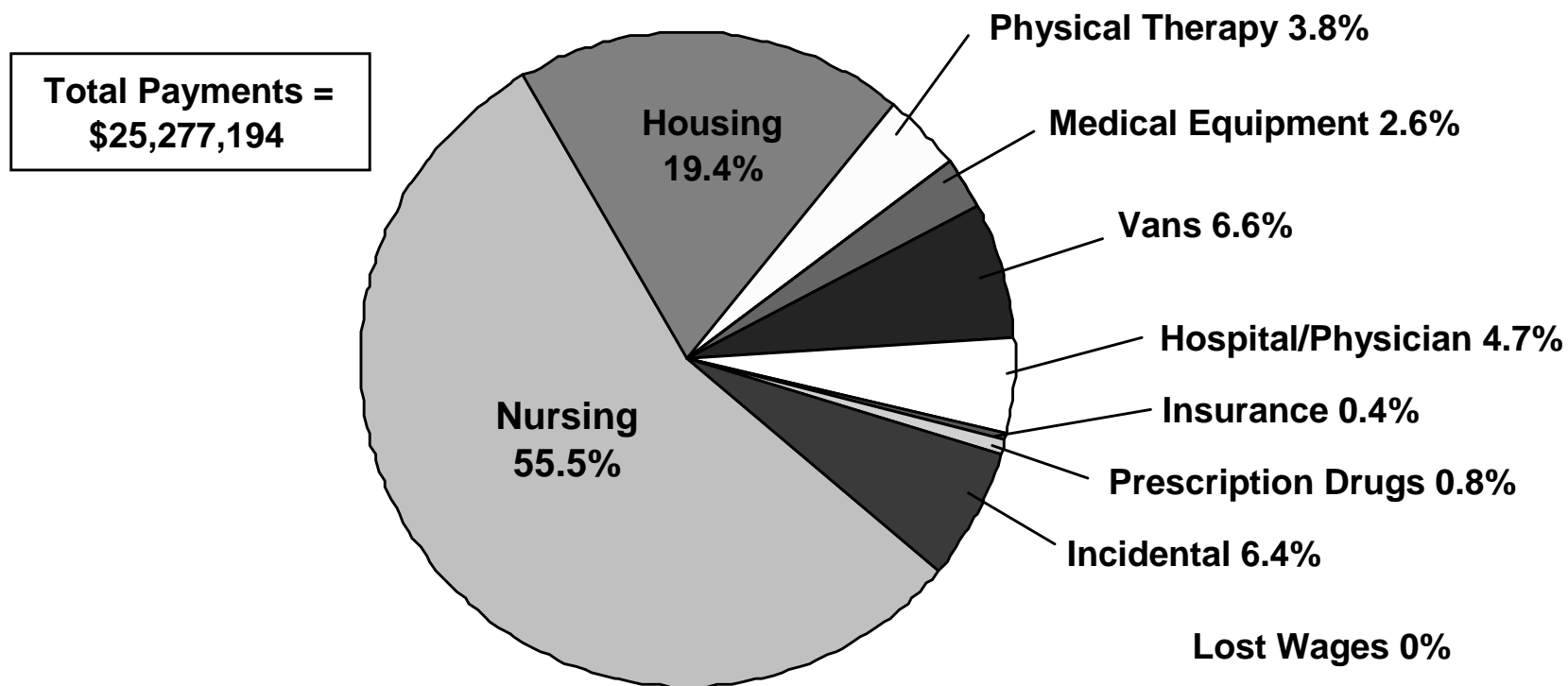
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- **Section 38.2-5009 of the *Code of Virginia* identifies three broad categories of benefits for which claimants will be compensated:**
  - **All “medically necessary and reasonable expenses of medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel” except those for which reimbursement has already been made**
  - **Loss of earnings from age 18 to 65**
  - **Reasonable expenses incurred in filing of a claim, including reasonable attorneys’ fees**

# Total Claimant Expenses, 1988 through 6/30/02

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# Funding the Birth Injury Program

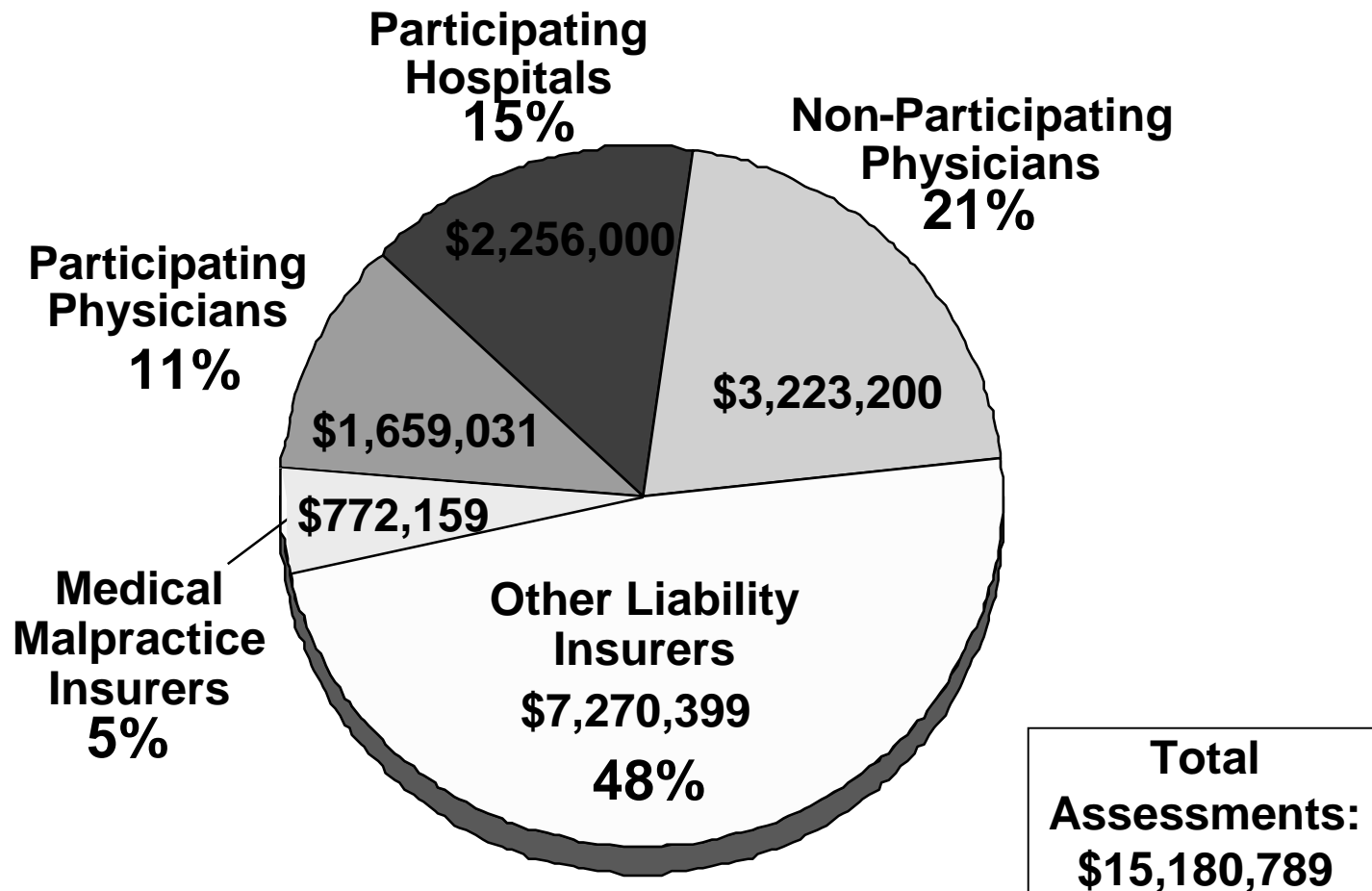
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- **The birth injury program is funded primarily by annual assessments on four sources:**
  - **Participating physicians - \$5,000**
  - **Participating hospitals - \$50 per live birth, capped at \$150,000**
  - **Non-participating physicians - \$250**
  - **Liability insurers – up to .25% of net direct premiums**
- **Currently, all four funding sources are being assessed at the maximum amounts allowed by law**

# 2002 Assessment Income, by Source

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# Presentation Outline

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- ☐ Introduction
- ☒ Impact of the Birth Injury Program
- ☐ Status of the Birth Injury Program
- ☐ Eligibility for the Birth Injury Program
- ☐ Program Administration

# **In General, Program More Beneficial to Children Than Virginia's Tort System**

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- **A greater number of birth injured children receive benefits from the program than from the tort system**
  - **Almost one-fourth of program claimant families either did not think their child's birth-related injury was due to malpractice or did not know**
- **Benefits provided by the program are estimated to exceed the medical malpractice award cap in Virginia**
- **Most parents believe the program is a better choice than a medical malpractice lawsuit (with the current cap)**

# **Program Is Not Unduly Burdensome for Parents**

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- **The eligibility process for the program is more timely than medical malpractice lawsuits**
  - **Average time between filing of petition and WCC's final order was about 4.3 months**
  - **Lawsuits often take years to settle. In one study, cases were closed in an average of three years**
  
- **The process for obtaining benefits from the program is not excessively cumbersome compared to awards to minors in medical malpractice suits**



# **There Are Some Disadvantages to Being in the Program**

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- **Mothers who are injured during the birthing process are prohibited from filing a malpractice suit on their own behalf**
- **Negligent physicians are not held accountable for their actions**
- **The program is less flexible in meeting the unique needs of each child, compared to a malpractice award**
- **Some families may receive less compensation than through the tort system**

# Virginia's Claims Costs Compare Favorably to Neighboring States

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Comparison of Malpractice Settlement Data by State for Obstetrician Birth-Related Cases, 1998 to 2002			
State	Average Number of Settlements Per Year	Average Settle- ment Amount	Total Amount of Settlements
Pennsylvania	83	\$378,115	\$157,673,750
North Carolina	12	813,417	48,805,000
Maryland	19	470,914	43,795,000
Florida	27	308,204	42,224,000
<b>Virginia</b>	<b>12</b>	<b>343,565</b>	<b>21,239,000</b>
West Virginia	5	471,519	12,259,500

# **Virginia's Claims Costs Compare Favorably to Neighboring States** (continued)

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- **Virginia (and Florida) have the lowest proportion of high cost awards compared to other neighboring states**
  - **During the past five years, five percent of Virginia's awards exceeded \$950,000, compared to 36 percent for North Carolina**
- **In each year since 1989, there were more birth-injured claimants accepted into the program than there were malpractice settlements greater than \$500,000**
- **These results suggest that the program, in tandem with the State's medical malpractice award cap, help to eliminate the more costly awards from the tort system**

# Physicians Experienced Low Mal-Practice Insurance Premiums in 1990s

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- Virginia's significant tort system changes along with relatively low malpractice claims record made the State an attractive market to insurers in the 1990s
- As new companies entered Virginia, competition increased, resulting in further reduced premiums for ob/gyns

St. Paul's Rates	Northern VA	Tidewater	Richmond	Rest of State
1988	\$46,500	\$43,100	\$29,400	\$34,500
1998	32,885	30,499	20,779	24,432
2001	39,985	36,703	28,726	31,918

# **Current Malpractice Insurance Market Reflects National Market Hardening**

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- **While the intense insurance competition in the 1990s benefited the medical community, it negatively affected the financial condition of insurers**
  - **Some insurers reportedly wrote policies for well below cost**
- **For a time, losses were recouped through gains in investment income. However, as investment income has declined, insurers have had to raise rates to better reflect their loss experience**
- **Despite substantial increases in premiums for Virginia's ob/gyns, these premiums are still less than for their counterparts in some other states**

# Some Physicians Receive Direct Financial Benefit from Participation

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- **The *Code of Virginia* requires insurers to provide a discount on malpractice insurance premiums for program participants (typically percentage-based)**
- **From 1995 to 2000 (when participating assessments were based on a sliding scale), many physicians received a significantly greater premium discount than the assessment paid to participate in the program**
  - **For example, a participating physician may have paid only \$500 to participate, but received an insurance discount of \$3,000. In other words, they earned money simply by participating**
- **Some physicians still benefit financially because, as premiums have increased, the dollar value of the discount in some cases is greater than \$5,000**

# **Program Reduces Concerns About Medical Malpractice Award Cap**

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- **Since the cap constrains costs, all physicians, hospitals, and medical malpractice insurers benefit from the cap remaining in place**
- **This review found that Virginia's medical malpractice cap is generally not sufficient to ensure that a severely birth-injured infant's medical needs are taken care of for his or her lifetime**
- **To the extent that these cases are excluded from the cap's provision (by inclusion in the program), the cap becomes potentially more reasonable**

# **No Direct Link Identified Between Program and Availability of OB Services**

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- **The rationale for the birth injury program was that by stabilizing medical malpractice premiums for obstetric providers and reducing their exposure to lawsuits, they would decide to continue practicing obstetrics in the State**
- **JLARC staff did not find differences in the ratio of ob/gyns to childbearing population in Virginia compared to neighboring states, attributable to the program**
- **Virginia ranks in the last six of all states regarding the percentage of family practitioners who provide obstetric services**
  - **In 1998, only 13 percent of Virginia's family practitioners offered obstetric services**



# **Program Assessments Are More Than Potential Cost of Virginia's Tort System**

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- **JLARC staff compared the program assessments with potential awards from the tort system paid by physicians, hospitals, and insurers**
  - **In 2002, participating physicians and hospitals and medical malpractice insurers paid almost \$4.7 million in assessments. Total assessments were almost \$15.2 million**
  - **JLARC staff estimates of potential tort system awards and expenses were \$10.8 million -- \$4.3 million less than the annual program assessments**

# **Program Assessments Are More Than Potential Cost of Virginia's Tort System**

(continued)

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- **While annual program assessments are more than the annual potential outlay from the capped tort system, the assessments are not borne exclusively by ob/gyns, hospitals, and their insurers**
- **Instead, the funding structure for the program is broader than the sources of funds for the tort system**
  - **A substantial portion of future program assessments will be paid by liability insurers that do not sell medical malpractice insurance. As allowed by law, these assessment costs will likely eventually be paid for by anyone who purchases liability insurance policies**
- **Despite the higher overall assessments, the program appears to be a cost-effective approach for ob/gyns, hospitals, and medical malpractice insurers as a group**

# **Impact on Obstetric Care to Indigent Women Is Unclear**

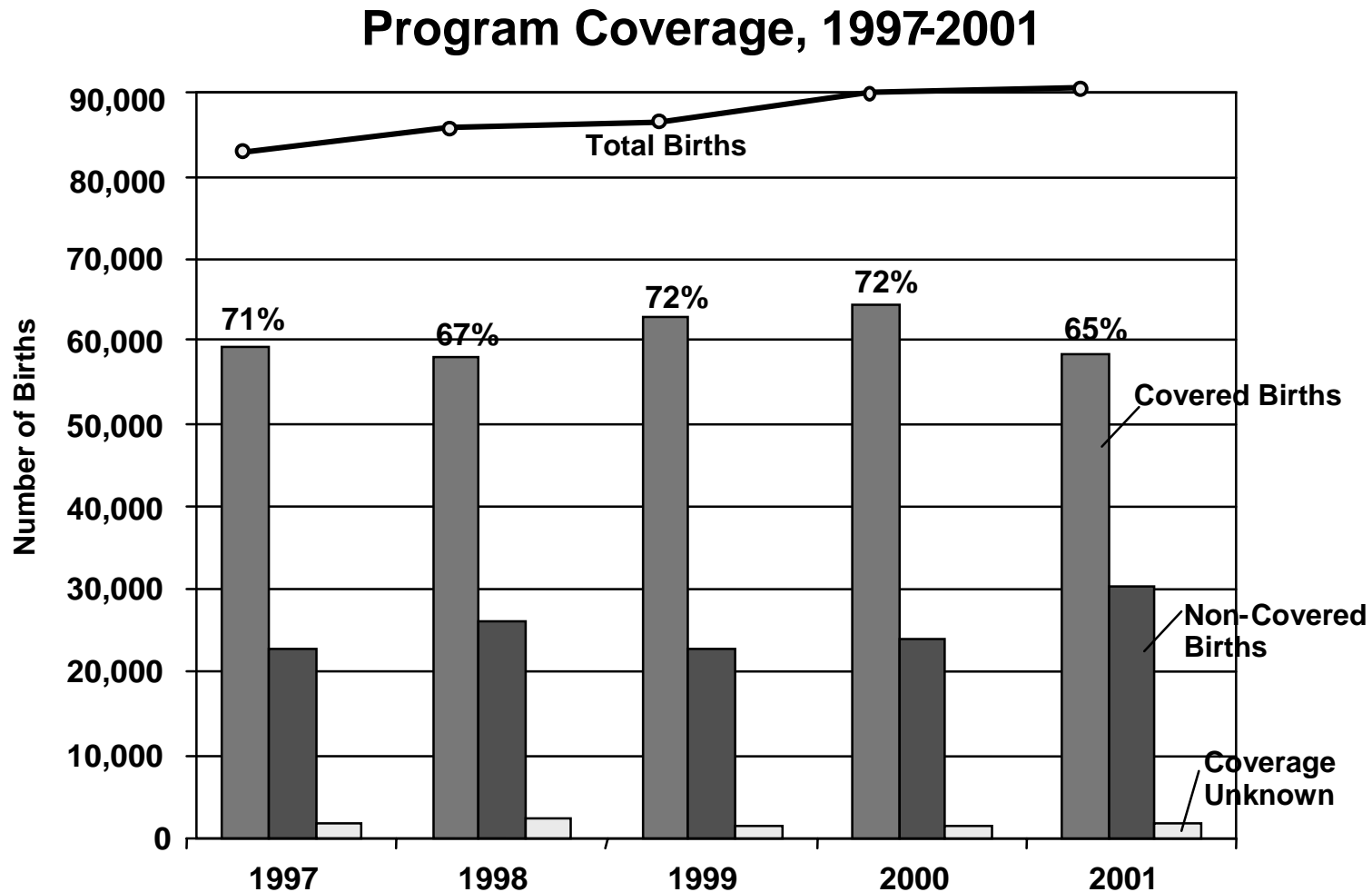
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- **A provision was included in the birth injury act to ensure increased access to obstetric care by indigent women**
- **In 1988, the Commissioner of Health coordinated the development and implementation of regional plans**
- **There is no indication that the plans have ever been updated or are currently in effect**
  - **Participants are not given a copy of the 1988 plan for their area, nor even notified that a plan exists**
- **Therefore, this portion of the birth injury act is not operational**

# Most Babies Are Potentially Covered by the Program

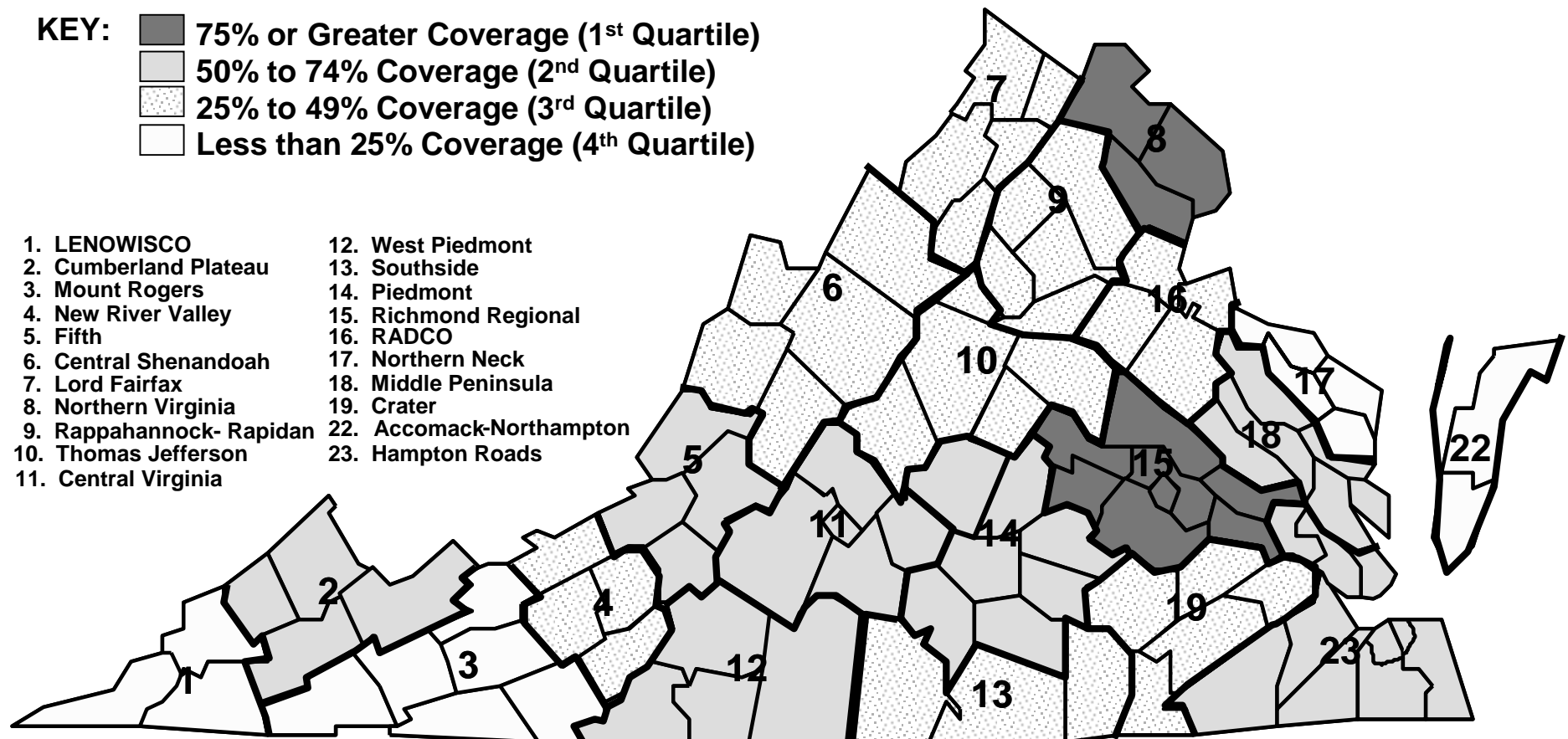
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# Voluntary Participation Provision Results in Regional Inconsistencies

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Proportion of Births Covered by the Birth Injury Program  
by Planning District, 2001



# Presentation Outline

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- ☐ Introduction and Summary of Findings
- ☐ Impact of the Birth Injury Program
- ☒ Status of the Birth Injury Program
- ☐ Eligibility for the Birth Injury Program
- ☐ Program Administration

# Financial Status of the Birth Injury Fund

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- At least biennially, the State Corporation Commission (SCC) hires an independent consulting firm to report on the actuarial soundness of the program, as required by law
- The latest actuarial report projects the fund will have a balance of \$84.7 million as of December 31, 2002. It also projects an unfunded liability of more than \$88 million
- Despite the unfunded liability, there appears to be no serious threat of a short-term deficit. In fact, according to the actuary, the current fund balance should be sufficient to meet claimant expenses for at least the next 25 years, provided current assessments are maintained

# **Early Actuarial Reviews Underestimated Program Cost**

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- **The fund was judged to be actuarially sound through most of the 1990s, but was deemed actuarially unsound as of 2001**
  - **In the early years of the program, the actuary had little or no data on actual claimant expenses from which to base its analyses. Only since 2001 has the actuary based its analyses on actual program expenses**
- **In hindsight, the assumptions it chose to use underestimated program costs**
- **Because estimated costs were thought to be so much lower, the perception was that the fund had more than enough money to provide lifetime care for the children**



# Major Changes in Actuarial Assumptions

Original Assumption (Year)	Changed Assumption (Year)
<b>1989:</b> Around 20 claimants will enter program each year.	<b>2001:</b> Around 7 claimants will enter program each year.
<b>1991:</b> Around one out of four children with a birth injury will die within the first year of life.	<b>2002:</b> Underlying life expectancy of 18.2 years from birth, 20.4 years from the age of three.
<b>1992:</b> On average, claimants will be institutionalized by the age of five.	<b>2001:</b> Claimants will not be institutionalized.
<b>1995:</b> There is a 10 percent probability that a claim will include a request for a house.	<b>2000:</b> Almost 70 percent of claimants requested and received either a trust home or cash grant (as of 2000).
<b>1988:</b> Fund investments will earn an annual return of approximately 8 percent.	<b>2001:</b> Fund investments will earn an annual return of approximately 6.5 percent.

# Lack of Board Oversight of Fund

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- **The birth injury board did not sufficiently scrutinize the actuarial assumptions and reports over the years**
- **Based on review of board meeting minutes, it appears that the board simply accepted the assumptions in the actuarial reports and based its funding decisions on the actuary's conclusions. For example:**

**Various parties involved in the program's creation expressed surprise that the actuary assumed in earlier reports that children in the fund would be institutionalized by the age of five. If this assumption was inappropriate, it was incumbent on the board to notify the actuary or the SCC that the assumption was wrong**

# **Lack of Board Oversight of Fund**

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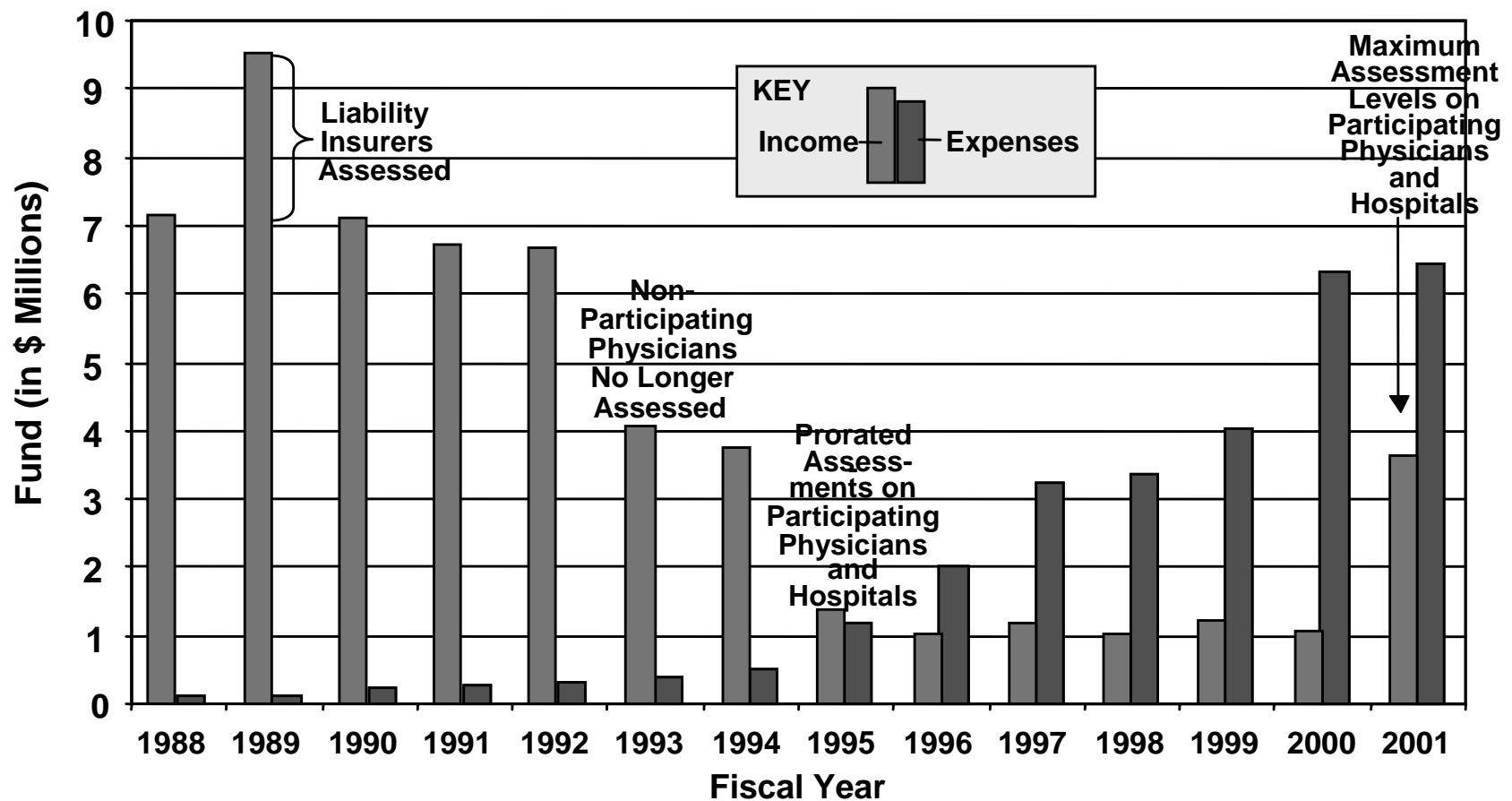
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- **From 1995 to 2000, the board prorated participating physician and hospital assessments according to the number of years of program participation**
- **The board justified its decision because of what had appeared to be an over-funded, underutilized program**
  - **At the time, only nine claims had been awarded in the previous three years.**
- **However, beginning in 1995, the number of claimants increased significantly, with 54 having been admitted to the program between 1995 and 2000. The board did not return assessment levels to their maximum levels until 2001**

# Assessment Income vs. Total Actual Expenses

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# **Lack of Board Oversight of Fund**

(continued)

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- **During this time period, the board also added a significant benefit to the program**
  - **In 1994, the board voted to begin providing trust homes for claimants' families. The average initial cost of the trust homes was around \$300,000**
  - **In 1999, the board voted to eliminate the trust home benefit, and instead offer cash grants for housing. The average cost of cash grants was \$350,000, and homes built with cash grants became the property of the families, not the fund. The program spent almost \$4.5 million in housing grants between 1999-2000**
- **While not the predominant reason for the fund's large unfunded liability, these decisions contributed to the eventual decline of the fund's financial projections**

# Recommendations

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- **The General Assembly may wish to consider amending the *Code of Virginia* to eliminate the birth injury board's authority to prorate participating physician and hospital assessments**
- **The birth injury board should conduct annual evaluations of the actuarial assumptions, and communicate any concerns to the SCC. To the extent it is unable to conduct such an investigation in-house, it should seek assistance from an independent consulting firm**

# Basic Assessment Structure Is Inadequate

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- In addition to allowing the board to prorate assessments on participants, the *Code* was changed in 1993 to require the SCC to suspend non-participating physician fees when the fund is deemed actuarially sound
- Also, liability insurers were identified as a “last resort” funding source rather than a required annual source
- In hindsight, the fund needed all of the current funding sources assessed in all years to remain actuarially sound
  - If all funding sources had been fully assessed, it is estimated that the program would have collected an additional \$140 million, and would have a financially sound outlook well into the future

# Options for the Future of the Birth Injury Program

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- There are three main options that could be pursued depending on the primary goals sought to be attained for the birth injury program
  - Maintain the program with its current structure
  - Maintain the program with mandatory participation
  - Eliminate the program
- Regardless of which option is pursued, the actuarial projections suggest that the current assessments are inadequate to fully meet the future liabilities of the fund
- If the fund is depleted in the future, it is not clear what the obligation of the General Assembly will be. However, since the General Assembly established the program, and claimant families had to relinquish their right to sue, it is possible that the State could be held liable for the shortfall



# Option 1: Maintain the Current Structure of the Program

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- While the program does not appear to be addressing all of its original purposes, it does appear to be meeting some important goals
  - It more directly meets the costs associated with the medical needs of birth-injured children compared to the tort system, and applies to more children than the tort system
  - Evidence suggests that the program has helped stabilize malpractice premiums for participating ob/gyns and hospitals, and to a lesser extent, all physicians and hospitals
- There are also some limitations to the current structure, such as inconsistent coverage of babies, especially in rural areas. Also, delaying the decision to eliminate the program or increase fees could increase the unfunded liability in the future

# **Option 1: Maintain the Current Structure of the Program** (continued)

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- **However, the true impact of the program may not be known for many years**
  - **While the actuary has begun to use program data that reflect the actual costs incurred by claimants, these data are still incomplete because the program is relatively young**
- **It is likely that additional modifications and refinements to the actuarial projections will occur as additional data are included in each subsequent actuarial review**
- **Given these factors, the General Assembly may want to consider continuing the program, with periodic program reviews to assess the status of the program over time**

# **Option 1: Maintain the Current Structure of the Program** (continued)

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- **Because this option maintains the current voluntary participation approach, the ability of the General Assembly to modify the assessments is limited**
- **However, one funding revision could be considered. Since the act's creation, hospital assessments have been capped at \$150,000. Therefore, any hospital with more than 3,000 births per year pays a lesser amount for coverage on a per-birth basis**
- **To increase the equity of this assessment, the General Assembly may wish to consider raising this cap to \$200,000**

# **Option 2: Institute Mandatory Participation**

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- **As with Option 1, this option maintains the program, but with a significant structural change – requiring all obstetric providers and hospitals to participate**
- **This approach has many of the same advantages of Option 1, such as helping to stabilize malpractice premiums**
- **It also would ensure that all babies with severe birth injuries (meeting the definition) would be covered by the program**

# **Option 2: Institute Mandatory Participation**

(continued)

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- **In addition, a mandatory system would enable the State to institute a fairer assessment structure – one based on obstetric caseload instead of a flat fee**
  - **The current flat assessment has served to minimize participation by rural physicians, who tend to deliver fewer babies per year**
  - **A family practitioner who delivers 40 babies per year pays the same \$5,000 assessment as an ob/gyn who delivers 125 babies per year**

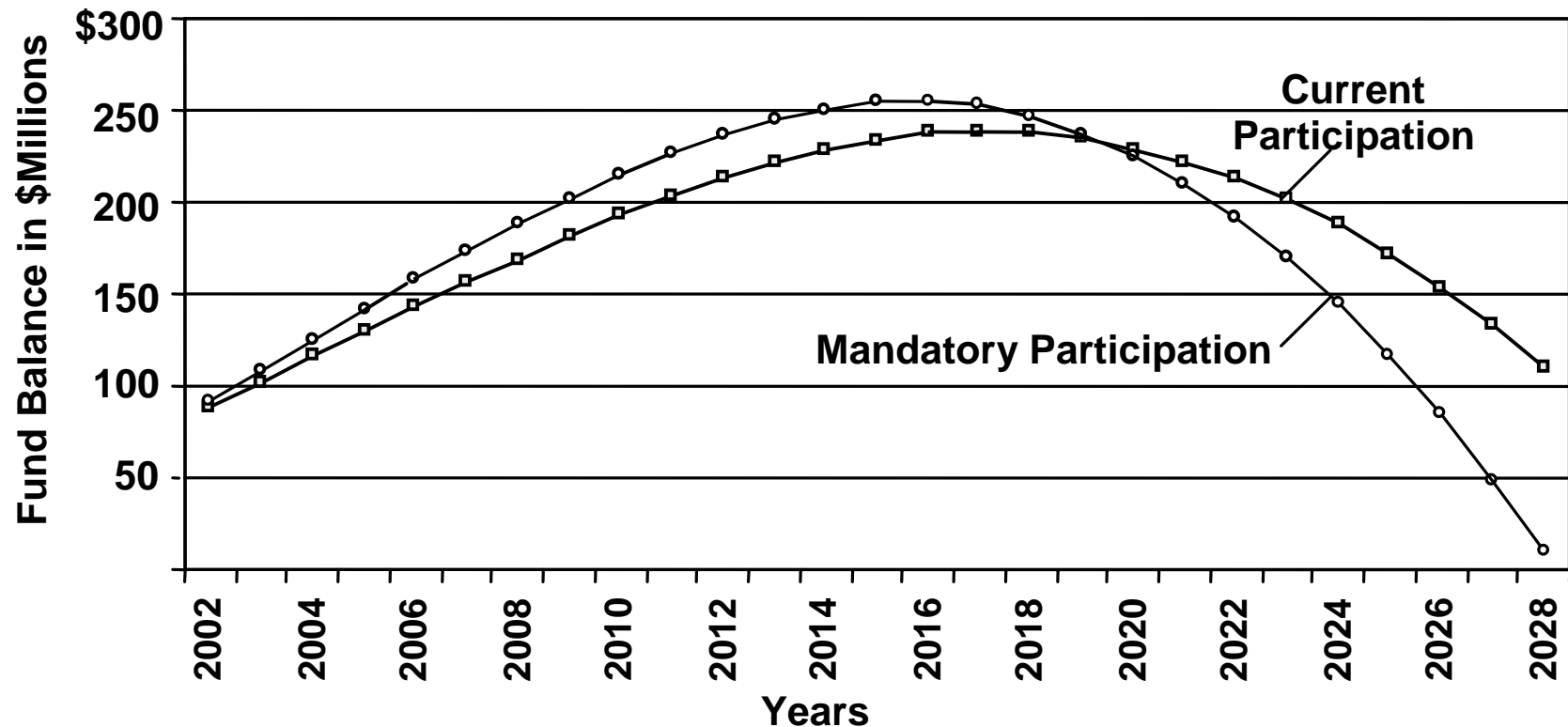
# Option 2: Institute Mandatory Participation

(continued)

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- However, the mandatory approach would be more costly

Comparison of Option 1 and Option 2 Projected Balances



## **Option 3: Eliminate the Program**

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- **To the extent that the program has done little to address the broad societal goals originally envisioned for the program, and particularly considering the program is more expensive than Virginia's capped tort system, the General Assembly may want to consider eliminating the program**
- **Also, given the projected future financial liability of the program, eliminating the program now may help minimize the eventual fund deficit**

# **Option 3: Eliminate the Program**

(continued)

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- If this approach were selected, the issue of how to dissolve the fund would need to be addressed
- The actuary estimates that there are 31 potential claimants who have been born (and are therefore potentially eligible), but are not yet in the program
  - Given the ten-year statute of limitations, the actual number of these claimants will not be known until 2012
- To account for these future claimants, it may be appropriate to continue operation of the program (without new assessments) until 2012. At that time, all the children in the program could be given a lump sum payment in lieu of the current benefit approach



# **Option 3: Eliminate the Program**

(continued)

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- JLARC staff estimate that in 2012, there would be approximately \$28 million remaining in the fund, which would not be enough to provide adequate payments to the potentially 90 children who would be living at that time
- Therefore, dissolving the fund will require an additional source of funding
  - For illustrative purposes, if the children were given a payment equal to the current malpractice award cap (\$1.65 million), up to \$120 million in additional funding would be needed to close out the program in 2012
- Without this program, the appropriate level for the malpractice cap would need to be reevaluated

# Options for the Future

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- **As the options suggest, there are difficult policy choices to be made regarding the future of the birth injury program. Two of the options presented result in the continuation of the program**
- **If the General Assembly wishes to continue the program, then significant improvements to the structure and management of the program will be needed**

# Presentation Outline

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# **The Basic Elements of the Eligibility Definition Appear Sound**

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- **The birth injury definition was intended to include events that occur during the birthing process that may reasonably be considered to be under the control of the obstetrician, and potentially subject to a lawsuit**
- **Based on a 1990 study by the MCV Williamson Institute, the current definition appropriately targets the cases most likely to become the subject of a lawsuit**
- **A review of the medical literature on birth injuries and cerebral palsy suggests that this definition is consistent with current medical research, and there are established criteria for determining these adverse events**
- **Given that the definition targets cases that are likely to end up in the tort system, and that criteria exist for determining which cases meet that definition, the definition appears generally sound**

# **The Program Is Not Suitable for Infants Who Die Shortly After Birth**

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- **Under the current definition, a baby must be born alive – that is, not stillborn – to be potentially eligible. There is no timeframe for how long the baby must have lived**
- **There have been inconsistencies in how such cases have been handled by the courts and WCC**
- **Inclusion of the children clearly benefits physicians because it allows them to avoid a potential lawsuit, but the benefits to the parents may be limited to the costs associated with the delivery and funeral expenses**
- **Since the program's intent is to pay the lifetime costs for birth-injured children, the fairness of admitting babies who die shortly after birth is questionable**

# Recommendation

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- **The General Assembly may wish to consider amending the *Code of Virginia* to permit families of infants who die within 180 days of birth to file suit against a participating physician or hospital rather than apply to the program**

# **Statutory Time Period of the Injury Should Be Clarified**

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- **The definition for a qualifying birth injury states that the injury must occur “in the course of labor, delivery or resuscitation in the immediate post-delivery period.”**
- **Because the term “immediate” has not been defined in the act, it has been interpreted differently by various parties at the eligibility hearings**
- **Since the focus of the program is on obstetricians, the time period of the injury should center around the time in which an obstetrician is most likely to be involved**
  - **The medical panels reported that the term immediate is commonly considered to be the first few minutes after birth**

# Recommendation

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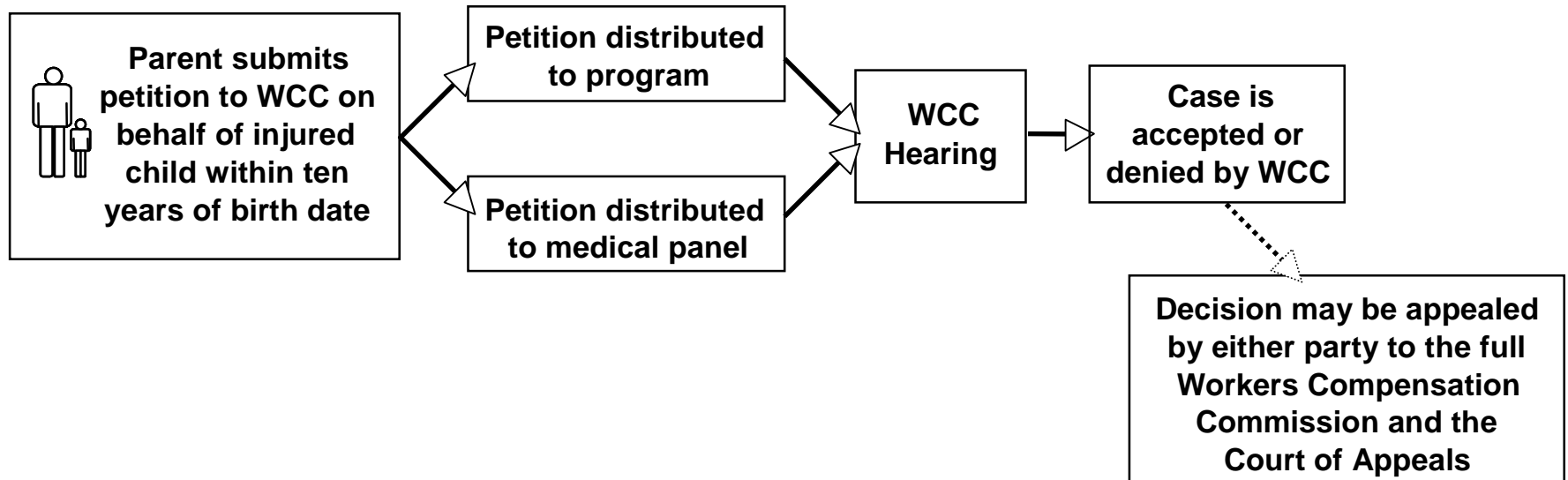
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- The General Assembly may wish to consider amending the *Code of Virginia* to redefine the statutory time period in the definition from “immediate post-delivery period” to “within one hour of delivery”



# Eligibility Process

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# The Application Process Needs Modification

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- The WCC has done an adequate job in handling the birth injury claims, and should continue hearing these cases
- While there is no evidence to suggest that the birth injury program has inappropriately denied or accepted cases, the program's participation in the application process poses a potential conflict of interest and should be eliminated
- Recommendations
  - The General Assembly may wish to amend the *Code of Virginia* to eliminate the requirement that the birth injury program file a response to petitions and eliminate the program's role in the WCC hearings

# **The Medical Panel Reviews Need to Be Strengthened**

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## **■ Several problems with the medical panel reviews were found, including:**

- The medical panels have been given little guidance regarding their role, and are unaware of many aspects related to the process**
- A lack of detail in the medical panel reports has limited their usefulness to the WCC**
- The medical panels have never received copies of WCC opinions or any other feedback on the usefulness of their reports, and therefore do not know how their reports are being interpreted**
- The medical panels do not routinely consider the disability portion of the birth injury definition when developing their opinions, in part because the panels do not include a pediatric specialist**
- The medical panel reviews have not been timely**

# Recommendations

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68

- **The act should be amended to require that the WCC and the medical panels meet on a yearly basis to discuss the eligibility process and any improvements that may be needed**
- **The WCC should provide copies of all birth injury opinions to members of the medical panels**
- **The medical panels should develop a review form, in consultation with the WCC, that addresses each aspect of the eligibility definition**
- **The deans of the medical schools should develop a plan to include both obstetrical and pediatric specialists on the medical panels**

# Recommendations

(continued)

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69

- The filing deadline for medical panels should be changed from “at least ten days prior to the date set for hearing” to “30 days from the date the petition was filed at the WCC”
- The act should require the WCC to forward a copy of the medical panel report to all petitioners
- The WCC should begin to incorporate Eastern Virginia Medical School into the medical panel review process
- The WCC should assign cases to the medical panels for review on a continuous rotation basis instead of alternating on a yearly cycle

# **The Eligibility Process Should Be More User Friendly for Parents**

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70

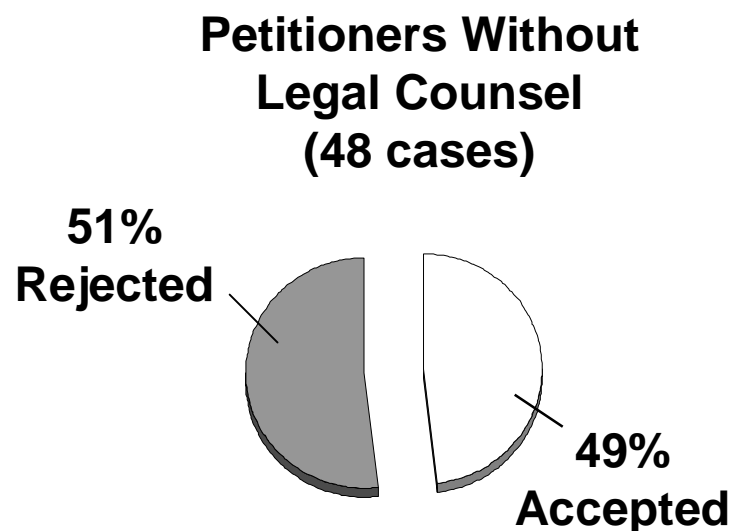
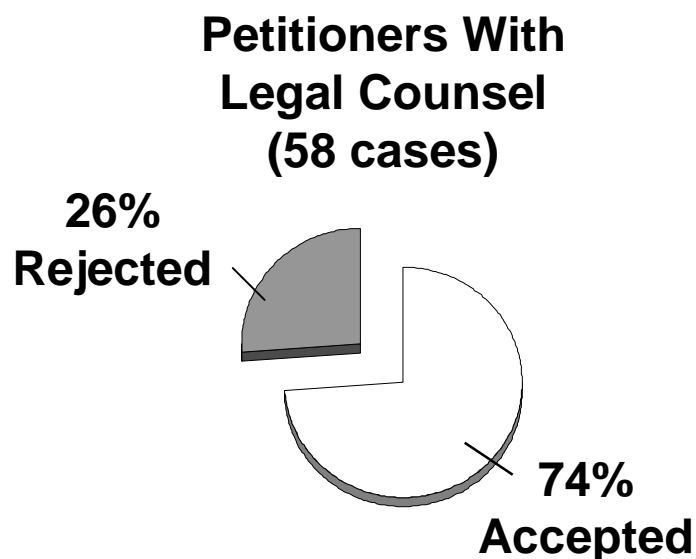
- **According to JLARC's survey of claimant parents, about half of the families found the eligibility process to be "somewhat difficult" or "very difficult"**
- **Many families did not understand the role of each party in the process. The only guidance received from the program is a copy of the birth injury act**
  - **For example, of the survey respondents who had a hearing, 73 percent did not know the program was opposing them**
- **Most of the survey respondents indicated that the hospital and physicians involved in their children's births were not helpful in providing information they needed to apply to the program, especially regarding hospital patient records**

# Families Should Have Greater Access to Legal Representation

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71

## Rate of Acceptance for Birth Injury Petitions Filed With and Without Legal Counsel



# Recommendations

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72

- **The program should develop an easy-to-understand hand-out that explains all aspects of the petition process, as well as an application form, that could be sent to anyone who inquires about applying to the program**



# Recommendations (continued)

73

## ■ The General Assembly may wish to amend the *Code of Virginia* to:

- Specify that hospitals are required to release all medical records, including fetal monitoring strips, to patients that plan to submit a petition to the program
- Specify that claimants will have a rebuttable presumption of fetal distress in the event that the hospital does not provide the fetal monitoring strips
- Specify that WCC has the authority to fine hospitals in the event that the child whose records are withheld is accepted into the program
- Allow WCC discretion in awarding reasonable attorney fees and expenses for cases filed in good faith, regardless of whether a child is accepted into the program
- Delete §38.2-5004(A)(i) and §38.2-5004(A)(j) of the *Code of Virginia* to be consistent with current practice

# Medical Reviews of Physicians and Hospitals Need to Be Strengthened

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74

- The act requires that all petitions submitted to the WCC be forwarded to the Board of Medicine and Department of Health to determine whether the physician(s) and hospital involved in each birth provided substandard care that would warrant disciplinary action
- JLARC staff found that minimal investigations of the birth events were conducted
  - In the vast majority of cases, the agencies read the petitions but conducted no further investigation
- No physician or hospital has been sanctioned based on these cases

# **Medical Reviews of Physicians and Hospitals Need to Be Strengthened**

(continued)

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75

- **Both the Board of Medicine and VDH report the findings from their petition reviews to the birth injury program. In addition, the Board of Medicine sends a letter of its findings to the physician(s) involved in each birth**
- **Neither agency reports its findings to the families of the birth-injured children**
- **While the agencies have reviewed most of the birth injury petitions, there are some cases for which reviews were not conducted**

# Recommendations

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76

- **The Board of Medicine and the VDH should interview the claimant families on the events surrounding the births as part of their reviews of birth injury petitions**
- **The Board of Medicine and VDH should routinely notify each claimant family concerning the outcome of each review**
- **The WCC should develop a plan for ensuring that all birth injury petitions, whether directly submitted by families of birth injured children or transferred by the circuit courts, are submitted to the Board of Medicine and VDH for review**

# Presentation Outline

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77

- ☐ Introduction and Summary of Findings
- ☐ Impact of the Birth Injury Program
- ☐ Status of the Birth Injury Program
- ☐ Eligibility for the Birth Injury Program
- ☒ Program Administration

# **Notification of Obstetric Patients Is Inadequate**

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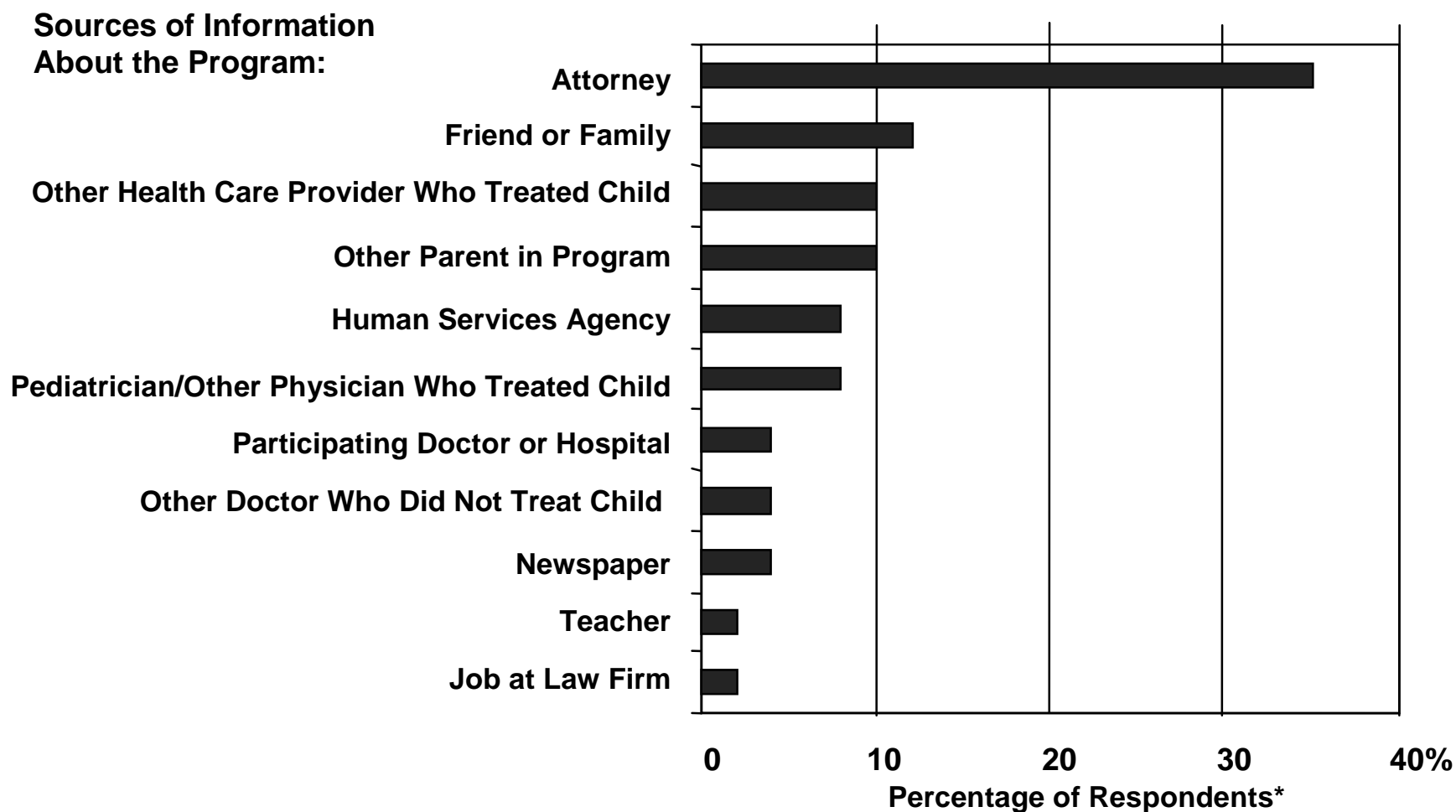
78

- In 1994, language was added to the act directing the board to establish a plan for notice to be given to obstetrical patients concerning the program, including a clear and concise explanation of a patients' rights and limitations under the program
- To address this mandate, the program developed a brochure, which they provide to participating doctors and hospitals to distribute to obstetrical patients
- However, most of the physicians who responded to JLARC's survey do not distribute the brochure to patients

# Notification of Obstetric Patients Is Inadequate

(continued)

79



\*N=51. Percentages shown in graph total more than 100% because some reported more than one source of information.

# Recommendations

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80

- **The program should revise the current brochure to better explain the patients' rights and limitations under the program, especially the “exclusive remedy” provision**
- **The exclusive remedy provision should be eliminated for participating physicians and hospitals that fail to notify obstetrical patients about the program, except for cases in which such notice is not practicable**
- **The program should develop a strategy for informing pediatricians and other health care providers that come into contact with disabled children about the program so that they can make potential referrals**



# Benefits Management Is Problematic

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81

- **There were no written guidelines describing the benefits for the first nine years of the program's operation**
- **After benefit guidelines were developed, they were incomplete and inconsistently applied**
  - **The housing benefit, especially, has resulted in large disparities between claimants**
  - **Although it appears that the program's current policy on housing renovations is fair for homeowners and is a comparable benefit to that which could be obtained through a malpractice award, it does not address the needs of non-homeowners**
- **The program's policy for paying for some primary health insurance premiums is not well defined**

# Benefits Management Is Problematic

(continued)

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82

- The act does not stipulate a requirement that all claimants either obtain private insurance or apply for Medicaid, creating an avenue for inappropriate use of the program
- The program needs to re-examine its policies related to nursing care to ensure that the current guidelines do not contribute to problems in obtaining reliable nursing care
- The lost wage benefit offered to claimants once they turn 18 years old has the potential to be problematic for the program if it does not plan ahead
- Although claimants are currently given an avenue for appealing benefit decisions of the board, this appeals process is not codified

# Recommendations

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83

- **The program should develop an updated, detailed set of program guidelines**
- **The program should develop a policy to address handicapped accessible housing for children of non-homeowners**
- **The act should explicitly state that claimants in the program should receive reasonable accommodations for handicap accessible housing, not to include the purchase of a house**
- **The act should require claimants to purchase private insurance and, for cases in which the claimant cannot afford to pay the premiums, should allow the program to purchase insurance for them**

# Recommendations

(continued)

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84

- The program should develop a consistent policy for payment of health insurance premiums for those families who cannot afford or do not have access to their own health insurance
- The program should begin planning for management of the lost wage benefit for children who attain 18 years of age. In part, the program should consider setting up special needs trust for claimants to ensure eligibility for Medicaid and disability benefits
- The act should be amended to specify that claimants in the program may appeal decisions by the program to the WCC

# **The Program Would Benefit from More Accountability**

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85

- **The program's status as a State or private entity is unclear**
- **Due to a lack of clarity on this issue, the program has not been made subject to any of the key regulations that govern public business, including the Freedom of Information Act (FOIA) and Administrative Process Act (APA)**
- **Because there is no oversight of this program, at a minimum it presents the appearance that the program and board do not have to account for their actions**

# Recommendation

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86

- **The General Assembly may wish to amend the act to require the program be made subject to FOIA, the Public Procurement Act, and the APA or another rulemaking process. The *Code of Virginia* should also be amended so that the program is required to receive an annual audit by a CPA. Finally, the *Code* should be amended so that the Office of the Attorney General is required to provide legal representation for the program**

# Program Services

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87

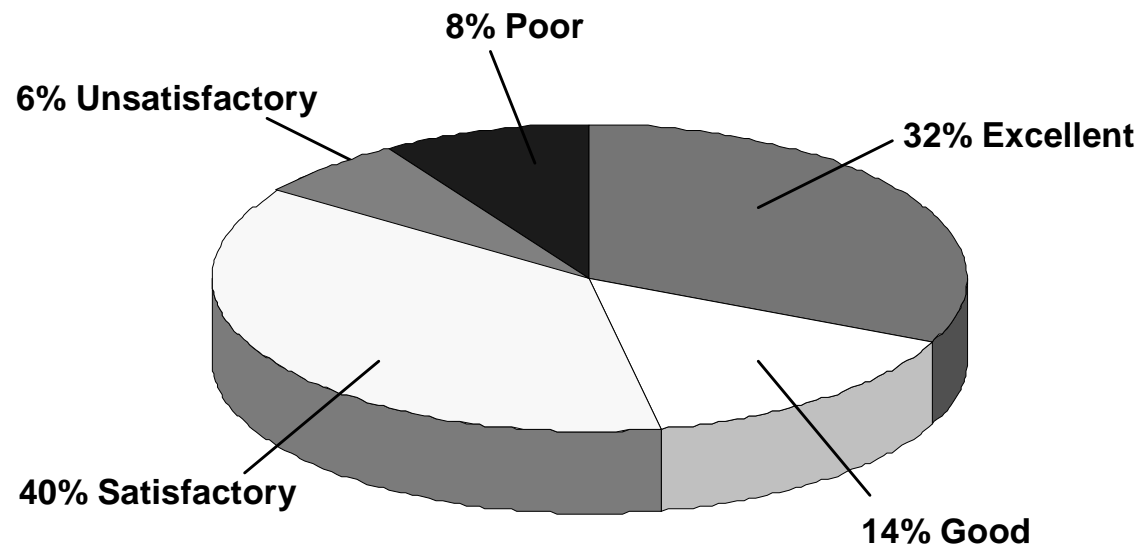
- Overall, the program appears to provide adequate services to families in the program
- The most frequent complaint about services relates to the amount of paperwork needed to receive benefits. However, JLARC staff reviewed the required documentation and found it to be an appropriate mechanism for ensuring that fund dollars are spent according to the act's intent
- Communication, on the other hand, has been a major shortcoming of the program and needs to be improved

# Program Services

(continued)

88

## Parent Ratings of Satisfaction with Program



N=50 respondents.



# Recommendations

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89

- **The program should follow existing procedures related to communication more closely to ensure that families are aware of all program policies. The program should also improve its website by including features to help families access information needed to obtain benefits**
- **The program should provide itemized reimbursement statements to families**
- **The program should explore options to better address the needs of families in transporting their children**

# Structure and Role of the Birth Injury Board

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90

- **Historically, the board has focused its efforts on benefits and other administrative matters, rather than its fiduciary duties**
  - **For example, it was not until 2001 that financial statements and investment reports from the fund manager were regularly distributed to board members**
- **The board lacks required representation from the disabled community, and has historically been deficient with regard to financial expertise**

# Recommendations

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91

- **The act should require that the board obtain advice on the fund's investment strategy from the Chief Investment Officer of the VRS on a semi-annual basis. In addition, the board should direct the fund manager to supply an annual explanation of expected returns on the equities and fixed income portfolios, and take steps to minimize its involvement in routine benefit decisions to allow for more focus on its fiduciary responsibilities**
- **The act should eliminate the non-participating physician representative, and require two citizen representatives with a background in the disabled community, and two citizen representatives with at least five years of professional investment experience**